

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

MOHAMED MOHSEN-MOHAMAD-ALI DAS  
OBAD,

Defendant-Appellant/Cross-  
Appellee.

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UNPUBLISHED

August 30, 2007

No. 269329

Macomb Circuit Court

LC No. 2005-002650-FH

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to commit sexual penetration, MCL 750.520g(1), and one count of fourth-degree criminal sexual conduct (CSC), MCL 750.520e(1)(b). He was sentenced to one year in the county jail. Defendant thereafter filed a claim of appeal with this Court and also moved for a new trial before the trial judge's successor. The trial court granted defendant's motion for a new trial on the ground that defendant's request to inquire about the victim's sexual conduct was improperly denied at trial. Although he was granted a new trial, defendant has continued to pursue his appeal. The prosecution has filed a cross appeal, challenging the trial court's decision to grant defendant a new trial. We reverse the trial court's order granting defendant a new trial and affirm defendant's convictions.

Defendant was convicted of sexually assaulting his wife in May 2005. At the time, the couple had been separated for 18 months, they were living apart, and the complainant had told defendant that she wanted a divorce. According to the complainant, she asked defendant to come to her home on May 24, 2005, to pick up some papers related to the divorce. She claimed that she allowed defendant into her home only to use the bathroom, but he subsequently removed his clothing and sexually assaulted her. At trial, defendant admitted to having sexual relations with the complainant on the night in question, but claimed that it was consensual.

After defendant was convicted, he moved for a new trial arguing, in part, that the original trial judge refused to consider the admissibility of evidence of the complainant's sexual history with defendant under an exception to the rape-shield statute, MCL 750.520j, solely because defense counsel failed to file a written motion to admit the evidence under the statute. The successor judge, without expressing an opinion on the admissibility of any evidence, ruled that it

was improper for the trial judge to preclude such evidence solely for failure to file a proper motion and, accordingly, granted defendant's motion for a new trial. The successor judge noted in its decision that the trial judge's ruling had "the potential of infringing upon defendant's constitutional right to confrontation."

### I Prosecutor's Cross Appeal

We first consider the prosecutor's argument on cross appeal that the successor judge erred in granting defendant's motion for a new trial.

A trial court's decision to grant a new trial is reviewed on appeal for an abuse of discretion. *People v Bennie Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). MCR 6.431(B) permits a trial court to grant a new trial for any reason that would support reversal on appeal or because the court believes that the verdict has resulted in a miscarriage of justice. *Jones, supra*. "In order to determine whether the trial court abused its discretion, we are required to examine the reasons given by the trial court for granting a new trial." *Id.* "This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *Id.*

The rape-shield statute, MCL 750.520j, provides:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g [MCL 750.520b to MCL 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
- (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MCL 750.520j is generally intended to prohibit the use of a victim's sexual history with others because such evidence is not relevant to a sexual assault by the defendant. When the proposed evidence relates to the victim's consensual sexual relations with the defendant, however, the focus is no longer on excluding such evidence because it is prejudicial, inflammatory, or misleading. Instead, evidence of past consensual sex with the defendant must

be evaluated by weighing its materiality and balancing the probative value against the prejudicial effect. *People v Adair*, 452 Mich 473, 481-482; 550 NW2d 505 (1996). Thus, evidence of specific instances of the complainant's past sexual relationship with defendant would have been admissible if was material to a fact at issue and its prejudicial effect did not outweigh its probative value.

In *People v Hackett*, 421 Mich 338, 349-350; 365 NW2d 120 (1984), our Supreme Court approved the use of in camera hearings to determine whether evidence subject to the rape-shield statute should be admitted. Before a defendant is entitled to such a hearing, however, he must make an offer of proof and demonstrate the relevance of the evidence. *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993).

The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right of confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. . . . Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. See MRE 403; . . . [*Hackett, supra* at 350-351 (Citations omitted).]

In *People v Dixon*, 263 Mich App 393; 688 NW2d 308 (2004), the defendant argued that his trial counsel was ineffective for not properly moving to admit evidence that he had consensual sexual intercourse with the victim a week before the alleged sexual assault. Defense counsel acknowledged the error, but argued that the purpose of the notice requirement was fulfilled because the victim testified about the prior sexual relationship at the preliminary examination and the evidence otherwise was admissible and relevant to the defendant's theory of consensual sex. *Id.* at 399. In its analysis, this Court found error by both the trial court and defense counsel:

This Court has held that failure to comply with the notice requirement of MCL 750.520j does not necessarily preclude the admission of evidence of past sexual relations between a victim and a defendant. In *People v Lucas (On Remand)* [, 193 Mich App 298, 303; 484 NW2d 685 (1992)], this Court found that the exclusion of evidence regarding past sexual activity between the defendant and the victim could violate a defendant's Sixth Amendment right of confrontation. Where no notice is filed, the trial court must determine whether the evidence is admissible on a case-by-case basis considering whether the defendant's timing of the offer to produce such evidence suggests an improper

tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect.

The trial court failed to consider on the record the import of defense counsel's timing and to weigh the probative value of this evidence. It is clear from the record, however, that the trial court determined to exclude this evidence based on defense counsel's failure to file a notice of intent. Evidence of the recent consensual sexual activity between defendant and the complainant is highly probative and very likely outcome determinative. Defense counsel was constitutionally deficient for failing to file the required notice of intent to produce this evidence. The failure of defense counsel to meet with her client between the preliminary examination and trial in this capital case; the failure to lay a proper foundation for admission of the 911 tape, in addition to the failure to provide notice pursuant to MCL 750.520j(2), cumulatively and effectively deprived defendant of his Sixth Amendment right to counsel. Defendant is, therefore, entitled to a new trial. [*Dixon, supra* at 399-400 (Footnotes omitted).]

In this case, there is no dispute that defense counsel never filed a written motion to admit evidence under an exception in MCL 750.520j. Instead, the prosecutor moved in limine before trial to preclude defendant from cross-examining the complainant about her past sexual relationship with defendant. During a discussion with the trial court, defense counsel proposed various hypothetical situations in which he believed evidence of the couple's past sexual history would be admissible. However, defense counsel never made an offer of proof with respect to any specific evidence he sought to present. The trial judge questioned the relevancy of evidence of the couple's past sexual history based on the hypothetical situations proposed, and commented that it did not believe that evidence of the couple's sexual relationship before their 18-month separation would be relevant. In response to defense counsel's question whether the court was "foreclosing any questions regarding the marital relationship," the trial judge told defense counsel that he would need to submit a proper motion. A motion was never submitted.

After reviewing the record, we conclude that the successor judge erred in granting defendant's motion for a new trial. The record does not support the successor judge's belief that the original trial judge refused to consider the merits of the admissibility of evidence offered under MCL 750.520j solely for failure to file a written motion. Rather, the record discloses that the trial judge did consider the merits of defendant's arguments, to the extent that he raised them in the context of hypothetical situations. However, defendant never made a proper offer of proof with respect to any actual evidence he sought to present, and its purpose, which was required before the judge was obligated to decide if the proffered evidence was admissible. Further, the judge did not completely foreclose the admissibility of any proffered evidence, but instead informed defendant that it would consider the admissibility of any evidence if a proper motion was submitted. Defendant never filed any motion. Without a proper offer of proof showing what specific evidence of the couple's sexual history defendant sought to admit, and its purpose, there was no basis for the trial judge to conclude that any evidence was relevant and admissible.

Furthermore, even when defendant moved for a new trial, he never made an offer of proof showing what specific evidence was available to overcome the general bar of the rape-shield statute. Without an offer of proof establishing the relevancy of any proffered evidence, the trial judge's ruling did not deprive defendant of his right of confrontation, because defendant

failed to establish that he was precluded from cross-examining the complainant on a relevant issue. *Adair, supra* at 488-489.

For these reasons, we reverse the successor judge's order granting defendant a new trial.

## II Defendant's Appeal

Having concluded that the successor judge erred in granting defendant a new trial, we shall consider defendant's issues on appeal.

An Arabic interpreter assisted defendant at trial. However, the complainant testified at trial that defendant speaks English very well and never indicated that he needed an interpreter when she was around him. Over defendant's objection, the prosecutor was permitted to cross-examine defendant concerning his ability to speak and comprehend English for purposes of testing his credibility. Defendant now argues that, because he had an interpreter, this was an improper line of questioning and denied him a fair trial. We disagree.

The scope of cross-examination is a matter left to the trial court's discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Cross-examination may be denied with respect to collateral matters bearing only on general credibility . . . as well as on irrelevant issues." *Id.*

We acknowledge that an attack on a defendant's credibility arising from the use of an interpreter can sometimes lead to abuses and misconduct. In *Commonwealth v Garcia*, 443 Pa Super 414, 427-428; 661 A2d 1388, 1395-1396 (1995), the defendant argued that it was improper for the prosecutor to repeatedly refer to his need for an interpreter. The court stated that the issue was not properly developed by the defendant, but addressed the issue in a footnote:

Even were we to address this issue, it is plain that no relief would be due. The record contains three instances in which the prosecutor briefly questioned appellant and two other witnesses regarding appellant's ability to converse in and comprehend English. . . . The prosecutor's examination does not suggest an attempt to ridicule appellant merely because he used an interpreter. Instead, the questions sought to attack appellant's credibility by implying that appellant did not need an interpreter since he was able to adequately communicate with the police and others on prior occasions. . . . Matters pertaining to credibility are certainly appropriate subjects for cross-examination. Assuming, *arguendo*, that the prosecutor's examination on this subject was inappropriate, a new trial is not required. A prosecutor's improper examination or comments require reversal only when they create a fixed bias or hostility toward the defendant such that the jury could not objectively weigh the evidence and render a true verdict. *Commonwealth v. Ford*, 539 Pa. 85, 105, 650 A.2d 433, 442 (1994); *Commonwealth v Edmiston*, 535 Pa. 210, 232, 634 A.2d 1078, 1089 (1993). The questions here were not of the type which would induce the jury to form a fixed bias and hostility towards appellant such that they could not objectively weigh the evidence. Moreover, the questions were isolated in nature and the significance thereof may well have escaped the jury's attention since it was neither exploited

by the prosecutor nor otherwise explained in his closing statement. Appellant thus was not prejudiced by these questions.

However, an attack on a defendant's credibility based on his/her desire to testify through an interpreter should not be the preferred mode of impeachment, as it comes perilously close to impinging upon the defendant's exercise of his/her fundamental constitutional rights. *See Commonwealth v. Pana*, 469 Pa. 43, 48-51, 364 A.2d 895, 898-899 (1976) (defendant's ability to use an interpreter encompasses numerous fundamental rights; trial court abused its discretion by refusing to permit the defendant to testify in Spanish via an interpreter and by suggesting that the defendant fabricated his language barrier where the defendant had patent difficulty understanding and speaking English). Full comprehension is critical in any legal proceeding, and perhaps even more so in a criminal matter where fundamental liberty interests are at stake. *Id.* It therefore would be neither unreasonable nor an attempt at fabrication for an individual for whom English is a second language to utilize an interpreter at trial to ensure that the questions and responses are fully understood, even though he or she would not do so for ordinary conversational purposes. [*Garcia, supra* at 428 n 13.]

In this case, we do not believe that the prosecutor's questions and arguments require reversal. The principal issue in this case was consent. The presence of an interpreter at trial may have given the jury the impression that defendant was incapable of understanding or comprehending English, giving rise to a possibility that he may have misinterpreted the complainant about whether she was willing to engage in sexual conduct. The complainant had previously testified that defendant spoke English well and never needed an interpreter when she was around him, so there was an evidentiary basis for believing that defendant had some ability to speak and understand English. In light of this backdrop, we believe inquiry concerning the extent of defendant's ability to speak and understand English was proper. Further, the record does not indicate that the prosecutor's questioning was intended to create bias against defendant because of the exercise of a fundamental right. Under the circumstances, the trial court did not abuse its discretion in allowing this line of inquiry.

Next, defendant argues that a new trial is required because of the prosecutor's misconduct. We disagree.

Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where the issue was not preserved with an objection at trial, however, this Court will reverse "only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 274-275. Reversal is not warranted if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction from the trial court. *People v Joezell Williams II*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), *aff'd* 475 Mich 101 (2006).

A prosecutor is afforded great latitude in closing argument. He is permitted to argue the evidence and reasonable inferences to support his theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id.* at 283. While

prosecutors have a duty to see to it that a defendant receives a fair trial, they may use “hard language” when it is supported by the evidence and are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant first argues that it was improper for the prosecutor to state in his rebuttal argument that defendant did not want the jury to hear what the complainant told an examining nurse shortly after the charged assault. The record discloses that defendant immediately objected to the prosecutor’s comment and the trial court sustained the objection and advised the jury that the complainant’s statements were not allowed because of an evidentiary ruling by the court. This was sufficient to cure any prejudice. Therefore, reversal is not required.

Defendant next argues that the prosecutor improperly vouched for the complainant’s credibility. A prosecutor may not vouch for the credibility of his witness by suggesting that he has some special knowledge of the witness’s truthfulness. *Bahoda, supra* at 276. However, he may argue, based on the facts, that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Viewed in context, the prosecutor argued that the complainant was believable because “all this corroborating evidence exists.” The prosecutor’s comment was based on the evidence and did not suggest that he had some special knowledge regarding the witness’s truthfulness. Thus, there was no plain error.

Defendant also argues that the prosecutor improperly shifted the burden of proof by arguing that defendant failed to provide an explanation for the complainant’s physical injuries. Although a defendant does not have the burden of producing any evidence, once the defendant advances a theory or defense, the prosecutor does not shift the burden of proof by commenting on that theory or any inferences drawn from the defense’s case. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). Attacking the credibility of a defense theory does not shift the burden of proof. *McGhee, supra* at 635. Here, defendant testified that the sexual encounter was consensual. The prosecutor could properly comment on the weaknesses of this defense by arguing that it did not account for the complainant’s injuries. Thus, there was no plain error.

Finally, defendant argues that it was improper for the prosecutor to comment on defendant’s ability to speak and understand English in his closing argument. As previously discussed, the trial court did not abuse its discretion in permitting this line of inquiry at trial. Therefore, it was not improper for the prosecutor to comment on this evidence in closing argument.

The trial court’s order granting defendant a new trial is reversed and defendant’s convictions and sentences are affirmed.

/s/ Helene N. White  
/s/ Brian K. Zahra  
/s/ Karen M. Fort Hood